85-2106

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF OHIO,

Petitioner,

vs.

PI KAPPA ALPHA FRATERNITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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22pp

QUESTIONS PRESENTED

1. Does the use of deception by law enforcement officers to gain entry into a home violate the Fourth and Fourteenth Amendments to the United States Constitution when the agents are not invited into the home for the specific purpose of engaging in any kind of illegal activity?

2. Whether the rulings in *Lewis* v. *United States*, 385 U.S. 206 (1966) and *Gouled* v. *United States*, 255 U.S. 298 (1921) were correctly interpreted by the Supreme Court of Ohio as holding that a deceptive entry into a private home constitutes an unreasonable search where such home is not a commercial center of criminal activity, and the invitation extended to the agents was not for the purpose of conducting illegal activities.

LIST OF PARTIES

Petitioner:
STATE OF OHIO

Respondent:
PI KAPPA ALPHA FRATERNITY

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No. _____

IN THE

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OCTOBER TERM, 1985

STATE OF OHIO,

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PI KAPPA ALPHA FRATERNITY,

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

The Petitioner, State of Ohio, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Ohio rendered on the 23rd day of April, 1986.

OPINION BELOW

The opinion of the Supreme Court of Ohio, rendered on April 23, 1986, is reproduced in Appendix A.

JURISDICTION

The decision of the Supreme Court of Ohio was filed on April 23, 1986. This petition was filed within 60 days of April 23, 1986.

Although the syllabus of the decision of the Supreme Court of Ohio cites Section 14, Article I of the Ohio Constitution as the basis for its ruling, Petitioner submits that said decision did not rest upon an adequate and independent state ground. Rather, the majority of the cases cited in the opinion were federal cases dealing with a violation of the Fourth and Fourteenth Amendments to the United States Constitution. In

fact, the Supreme Court of Ohio placed principal reliance upon two United States Supreme Court decisions, to wit, *Gouled* v. *United States*, 255 U.S. 298 (1921), and *Lewis* v. *United States*, 385 U.S. 206 (1966). Since this state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, this Court may accept jurisdiction under 28 U.S.C. Section 1257(3). *Michigan* v. *Long*, 463 U.S. 1032 (1983). At the very least, this is one of those cases where the state court felt compelled to rule as it did by what it understood to be federal constitutional considerations. *Delaware* v. *Prouse*, 440 U.S. 648 (1979). Such being the case, Petitioner prays this Court to accept jurisdiction, and decide the federal issue, for if the state court erred in its understanding of the decision of the United States Supreme Court, this Court should so declare. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ohio Constitution, Article I, Section XIV:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 1, 1983, two "plain clothes" agents from the State of Ohio Department of Liquor Control sought admission into the defendant's residence for the prupose of investigating anonymous complaints concerning illegal sales of liquor. The house which the agents sought to enter served as a private residential facility for fraternity brothers. Admittance was restricted to fraternity members and their invited guests.

As the agents approached the property, they were met by the house manager who asked them the purpose of their visit. At that time neither agent identified themselves as liquor control agents, nor stated the true purpose of their visit. Instead, one agent represented himself as a Pi Kappa Alpha alumnus and stated that he wished to examine the fraternity house on behalf of a younger brother who was interested in joining. The other agent said nothing.

Based upon the one agent's fabricated story, the house manager not only admitted both agents into the house, but also gave them a guided tour. While present in the fraternity house, the liquor agents were escorted by the same house manager at all times. During the course of the tour the agents observed a soft drink vending machine, which advertised the fact that the contents of the machine were really cans of beer. Upon seeing this, one agent asked the house manager if he could purchase a beer from the vending machine. Upon

receiving permission from his escort, the agent deposited fifty cents in the machine, and received one can of Budweiser beer. After the purchase had been completed, the agent informed his host that he had changed his mind and desired to drink the beer at a later time. With that, the agent placed the beer can in his pocket, where the can remained until the agents exited the defendant's premises.

It was based upon the observation of the agents while in the house; the purchase of this one can of beer; and the fact that the fraternity lacked a license to sell beer, that the agents were able to obtain a search warrant, which was executed the next day.

The defendant was subsequently charged with three criminal offenses: sale of an alcoholic beverage without a permit, in violation of Ohio Revised Code § 4301.58(B); possession of alcoholic beverages for sale without a permit, in violation of Ohio Revised Code § 4301.58(B); and possession of untaxed alcoholic beverages, in violation of Ohio Revised Code § 4301.67.

Prior to the trial, the defendant filed a motion to suppress all evidence which had been seized by the agents on the date of the initial deceptive entry, and on the next day, pursuant to the search warrant. The trial court, citing *Gouled* v. *United States*, 255 U.S. 298 (1921) held that the means of entry by the agents violated the Fourth Amendment to the United States Constitution. The trial court then ordered the suppression of all evidence obtained as a result of the deception of the agents.

The state appealed the trial court's ruling. On December 26, 1984, the First District Court of Appeals of Ohio, distinguished the *Gouled* decision, and cited *Lewis* v. *United States*, 385 U.S. 206 (1966) as its basis for reversing the decision of the trial court.

The defendant then appealed that decision to the Supreme Court of Ohio. On April 23, 1986, the Supreme Court of Ohio, also citing *Gouled* and *Lewis*, reversed the lower ap-

pellate court decision, and affirmed the trial court's original order suppressing all evidence which was obtained as a result of the agent's deceptive entry.

It is this ruling by the Surpeme Court of Ohio that petitioner hereby seeks review.

REASONS FOR GRANTING THE WRIT

1. **The Supreme Court of Ohio based its decision in this case on its misinterpretation of *Gouled* v. *United States,* 255 U.S. 298 (1921) and *Lewis* v. *United States,* 385 U.S. 206 (1966), by holding that those cases permit a deceptive entry into a residence by government agents without a warrant only where the home is a commercial center for criminal activity and where the invitation is extended for the purpose of conducting illegal activities.**

In its decision in the present case, the Supreme Court of Ohio has superimposed on the Fourth and Fourteenth Amendments to the Constitution of the United States, a requirement that a home or office must be a center for commercial criminal activity and that an invitation to enter for the purpose of conducting illegal activity must be extended to government agents, who conceal their identity, in order for their warrantless search to be reasonable. This holding is contrary to the prior opinions of this Court which specify that a warrantless search is reasonable when the defendant has no legitimate expectation of privacy in the area searched. *Katz* v. *United States*, 389 U.S. 347 (1967), and when the government agents do not engage in conduct which exceeds the scope of their invitation. *Gouled* v. *United States*, 255 U.S. 298 (1921).

In determining whether a defendant has a reasonable expectation of privacy, this Court has clearly stated, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. Therefore, the test of a reasonable

search or seizure does not turn on the nature of the area involved, *i.e.*, whether it is a commercial center for criminal activity.

Moreover, the fact that the government agents conceal their identities does not invalidate an otherwise reasonable search or seizure. In *Lewis* v. *United States*, 385 U.S. 206 (1966), this Court recognized the necessity for undercover police activity and the right of government agents to conceal their identities during the course of their covert operations. The fact that the owner of the property does not know the true identity of the persons in whom he places his confidence does not prevent the loss of his expectation of privacy when he willingly exposes his secret criminal activity. *United States* v. *Schuster*, 684 F.2d 744 (11th Cir. 1982). Even when a defendant relates a confidential matter to a friend or close associate, he runs the risk that his friend will cooperate with law enforcement. *Hoffa* v. *United States*, 385 U.S. 293, 303 (1966).

The holdings of the above cited cases are clearly applicable to the factual situation presented in the instant case. Here, we have a situation where the manager of the Pi Kappa Alpha fraternity house was confronted by two complete strangers, who sought entry into the house. The manager's options were simple: he could deny them access, or permit them to enter. He chose the latter, and by doing so, he waived any expectation of privacy in the house, so long as the agents' actions in the house did not exceed the scope of their invitation. The *Gouled* case stands for the proposition that subsequent activities by agents which exceed the scope of their invitation may serve as a basis for suppression of any evidence so uncovered. While the Ohio Supreme Court cites in its decision that it is following the *Gouled* case, here a member of the defendant's organization was present with the agents at all times. The agents acted purely within the scope of their invitation, and neither ransacked any part of the house, nor removed anything without first having received permission from an agent of the defendant.

2. The interpretation of federal law by the Supreme Court of Ohio conflicts with the interpretation propounded by the Federal Courts of Appeal.

While the Ohio Supreme Court purported to follow the *Lewis* decision, its interpretation of the holding of that case, which was related in petitioner's first argument, is contrary to that of the Federal Courts of Appeal. For example, in interpreting the *Lewis* decision, the Court of Appeals for the Tenth Circuit specifically rejected the defendant's contention that government agents acted improperly by using deception to gain entry when they were not invited into that residence for the purpose of engaging in illegal activities. *United States* v. *Oakes*, 564 F.2d 384 (10th Cir. 1977). The Court held that neither the defendant's intent in extending the invitation; nor the agent's intent in accepting the invitation was a critical factor. *Id.*, at 386. Rather, the critical factor was that the agent entered only at the defendant's invitation, and removed only that which was freely offered. *Id.* This same rationale has been explicitly followed by several other federal circuit courts, *e.g.*, *United States* v. *Wright*, 641 F.2d 602 (8th Cir. 1981); *United States* v. *Guidry*, 534 F.2d 1220 (6th Cir. 1976); *United States* v. *Glassel*, 488 F.2d 143 (9th Cir. 1973).

Furthermore, in *United States* v. *Scherer*, 673 F.2d 176 (7th Cir. 1982), the court dealt with a factual situation quite similar to that presented by the case before this Court, in that the suspect's home could not be categorized as a commercial center of criminal activity and the agents were not invited onto the premises for the purpose of engaging in illegal activities. In the *Scherer* case, the government agents were invited onto the defendant's property to build duck blinds. When they were given permission by the defendant's wife to search for wood, they observed two Thompson submachine guns in the barn.

The *Scherer* court recognized the right of law enforcement officers to obtain an invitation onto the premises by misrepresenting or concealing their identity. In so doing, the

court implicitedly rejected the theory that the intent of the defendant in extending the invitation or the intent of the government agents in accepting the invitation is the controlling factor. Furthermore, the court indicated that once entry has been gained in such a manner, the use of evidence of unlawful activity in plain view observed while the government agents were acting within the scope of their invitation did not violate the defendant's Fourth Amendment protection against unreasonable intrusions. The fact that the agents were aware before the visit of evid nce of illegal activity on the premises did not take the case out of the consent exception to the warrant requirement. *Scherer*, 673 F.2d at 182.

The above cases are all consistent in that they stand for the proposition that an entry by consent, even though obtained by ruse, does not impermissibly infringe on a defendant's Fourth Amendment rights; and once a suspect knowingly exposes to another that which would otherwise be private, he assumes the risk that his confidant may later expose his secrets; and thus, the defendant loses any legitimate expectation of privacy which the Fourth Amendment would otherwise protect.

3. The decision of the Ohio Supreme Court is impractical and will severely hamper legitimate law enforcement investigations.

This Court has previously recognized the necessity of covert investigations by law enforcement agents in their fight against crime. In footnote 6 of *Lewis* v. *United States*, 385 U.S. at 211, this Court states:

> Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses. The participants in the crime enjoy themselves. Misrepresentation by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a practical necessity. . .

The Supreme Court of Ohio, while claiming to follow the *Lewis* decision, has as a practical matter "come near to a rule that the use of undercover agents in any manner is virtually unconstitutional per se." *Lewis*, 385 U.S. at 210. Under this new ruling a person who uses his home to engage in illegal activities no longer needs to worry about losing any expectation of privacy he may have by exposing his activities to any other individual who may be present, so long as the suspect initially asks his guest whether he is either a police agent, or someone working with the police. Obviously, should the guest respond in the affirmative, entry will be denied. Should the guest lie, entry may be granted, but anything subsequently observed or taken will be suppressed.

Thus, the Supreme Court of Ohio has expanded the Fourth Amendment to protect wrongdoers from misplaced confidence in their associates, completely contrary to the holding of this Court in the *Hoffa* case.

CONCLUSION

The decision of the Supreme Court of Ohio misinterpreted several decisions by this Court, ignored numerous decisions by federal circuit courts, and establishes a rule of law which is contrary to public policy. The effect of this ruling is to expand the protection of the Fourth Amendment to an area never contemplated by the framers of our Constitution.

For the reasons stated, a Writ of Certiorari should issue to review the decision of the Supreme Court of Ohio in this case.

Respectfully submitted,

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APPENDIX A

THE STATE OF OHIO, APPELLEE, *v.* PI KAPPA ALPHA FRATERNITY, APPELLANT.

[Cite as State *v.* Pi Kappa Alpha Fraternity (1986), 23 Ohio St. 3d 141.]

Criminal law—Searches and seizures—Government officers not privileged to deceptively gain entry into private home or office without warrant, when.

O.Jur 3d Criminal Law §§ 503, 511.

Pursuant to Section 14, Article I of the Ohio Constitution, and in the absence of any judicially recognized exception to the warrant requirement, government officers are not privileged to deceptively gain entry into the private home or office of another without a warrant, where such home or office is not a commercial center of criminal activity, and where the invitation to enter the private home or office was not extended by the occupant for the purpose of conducting illegal activities. (*Gouled* v. *United States* [1921], 255 U.S. 298; and *Lewis* v. *United States* [1966], 385 U.S. 206, followed.)

(No. 85-219—Decided April 23, 1986.)

APPEAL from the Court of Appeals for Hamilton County.

On December 1, 1983, two agents employed by the Ohio Department of Liquor Control made a visit to the house of defendant-appellant, Pi Kappa Alpha fraternity. Apparently, the agents went to the fraternity house in order to investigate the validity of complaints made alleging that illegal sales of liquor were being perpetrated on defendant's premises. Upon walking up the driveway adjacent to the fraternity house, the agents were met by the fraternity house manager. It is conceded by the plaintiff-appellee, state of Ohio, that the agents did not identify themselves as liquor agents, nor did they reveal the true purpose of their visit. One of the agents

fabricated a story whereby he told the house manager that he was an alumnus of Pi Kappa Alpha fraternity in Georgia, and that he wished to examine the fraternity house on behalf of his brother who was interested in attending the University of Cincinnati and joining the defendant-fraternity. Upon hearing this, the house manager escorted the two around the inside of the fraternity house.

During the course of the tour, the agents observed a "Coke" machine containing several brands of beer. One of the agents asked permission to purchase a can of beer from the machine, which the house manager granted. The agent deposited fifty cents into the machine and received a can of beer which he put in his pocket. The agent stated that he intended to drink the beer later. Shortly thereafter, the tour of the house concluded, and one of the agents gave the house manager a fictitious name and address before departing the premises. The agents then set out to obtain a warrant to search the fraternity house.

The next day, the search warrant was executed and a search of the fraternity house ensued. On December 3, 1983, the defendant was charged, as an organization pursuant to R.C. 2901.23, with separate counts for selling an alcoholic beverage without a permit; possession of alcoholic beverages for sale without a permit; and, unlawful possession of untaxed alcoholic beverages in excess of one quart.

The matter proceeded to the Hamilton County Municipal Court, and defendant filed motions to suppress the evidence obtained during the search. After a hearing, the trial court granted defendant's motions to suppress, reasoning that since the agents gained entrance to the fraternity house by deception, they were therefore trespassers pursuant to R.C. 2911.21(C). The court relied on the decision in *Gouled* v. *United States* (1921), 255 U.S. 298, in stating that surreptitious entry by stealth, or through social acquaintance, or in the guise of a business call violates the Fourth Amendment. The court concluded that evidence seized in contravention of Fourth Amendment rights cannot be the basis of a valid search warrant and any evidence so acquired is inadmissible.

Upon appeal, the court of appeals reversed and remanded in a split decision. The appellate majority held that the agents had a "privilege" pursuant to R.C. 2911.21 to investigate complaints concerning the unlawful sale of beer by virtue of their status as individuals charged with the duty of enforcing Ohio's liquor laws. The court further held that in the exercise of that privilege, the agents were entitled to obtain admission to the fraternity house by the deception employed here, and that such deception did not violate the Fourth Amendment.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Richard A. Castellini, city solicitor, *Paul J. Gorman*, city prosecutor, and *Terrence R. Cosgrove*, for appellee.

Croswell & Adams Co., L.P.A., R. Scott Croswell III and *Elizabeth E. Agar*, for appellant.

SWEENEY, J. The state contends that undercover law enforcement officers, actively engaged in an official investigation, do not commit criminal trespass by gaining entry into the residence of another under false pretenses, since such noncoercive activity is privileged. The state further argues that the appellant fraternity waived any right to privacy in the areas of the fraternity house shown to the liquor agents, since the fraternity house manager consented to the agents' entry.

The fraternity argues that it did not waive its constitutional right to be free from an unreasonable search by consenting to the agents' entry, since the consent was obtained by deception and the invitation extended to the agents was not made for the purposes of conducting illegal activity within the fraternity house. The fraternity further contends that even a consensual entry constitutes a trespass, if the entry was gained by deception. Appellant submits that the agents were not privileged to enter the fraternity house, a private residence, since the entry was accomplished without a warrant, and since there were no exigent circumstances to justify the entry.

The central issue we must determine is whether the manner in which the liquor agents gained access to the interior of the fraternity house violated the Fourth and Fourteenth Amend-

ments and Section 14, Article I of the Ohio Constitution. The state submits that the United States Supreme Court has acknowledged that law enforcement agencies may use artifice and stratagem to ferret out criminal activities of certain types. *Lewis* v. *United States* (1966), 385 U.S. 206.

While it is beyond question that police officers must have the ability to engage in undercover activities in order to combat crime, we believe that the state and the court of appeals below have either missed or ignored the essential point of the *Lewis* case. In *Lewis*, the high court reconciled its prior holding in *Gouled* v. *United States* (1921), 255 U.S. 298. The high court, in *Gouled*, held as unconstitutional a situation where a business acquaintance of the petitioner acting under orders of federal officers deceptively obtained an invitation to a private office and then proceeded to ransack the office and seize certain private papers of an incriminating nature. The *Lewis* court stated at 211:

"* * * [W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purpose contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation to the *Gouled* case, *supra*, is sufficient to dispose of that contention."

In the cause *sub judice*, we believe that it is clear that the liquor agents were not invited into the fraternity house for the purpose of conducting illegal business (*i.e.*, illegal sale of beer). Moreover, we find no evidence tending to show that the fraternity house was in any way a commercial center of criminal activity. Thus, it is our view that the *Lewis* case does not support the arguments proffered by the state, except insofar as *Lewis* endorsed the use of undercover police work in

order to ferret out criminal enterprises. Since neither *Lewis* nor *Gouled* supports the warrantless search herein, our inquiry turns to whether the instant search was nevertheless constitutional under any of the generally recognized exceptions to the warrant requirement. As appellant points out, "[i]t is axiomatic in our criminal justice system that warrantless searches are, per se, unreasonable, unless they fall within one of the established exceptions. *Katz* v. *United States*, 389 U.S. 347 (1967)."

We observe that although situations involving hot pursuit and exigent circumstances can transform an otherwise invalid warrantless entry or search into a valid one, the instant cause does not even remotely present either of these justifications. The trial court below correctly refuted the argument that the beer in question was in the "plain view" of the liquor agents. In *State* v. *Williams* (1978), 55 Ohio St. 2d 82 [9 O.O.3d 81], we stated in paragraph one of the syllabus: "In order for evidence to be seized under the plain view exception to the search warrant requirements it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; * * *."

In order for the initial intrusion of the liquor agents to have been lawful, the facts of the instant case require us to determine whether appellant freely and voluntarily consented to the liquor agents' entry and search. In this vein, the burden is upon the state to prove that consent was freely and voluntarily given. *Bumper* v. *North Carolina* (1968), 391 U.S. 543, 548 [46 O.O.2d 382].

In reviewing the facts of the instant cause, we note that it is conceded that the liquor agents gained invitation into the fraternity house by fabricating their identities as well as the true purpose of their visit. The invitation extended by the fraternity house manager, however, was clearly made for the purpose of exhibiting the fraternity house with the probable goal of recruiting a potential member. Such, in our view, does not amount to a free and voluntary consent to conduct illegal activity. Hence, we agree with the trial court that consent obtained through deception cannot be said to have been

given freely and voluntarily. *Gouled*, *supra*. Therefore, we concur in the trial court's finding that the state failed to sustain its burden of proof with respect to consent. Since the initial intrusion by the liquor agents was not lawful under *Williams*, *supra*, because it was based on a lack of voluntary consent, it necessarily follows that the beer in issue could not have been constitutionally seized under the "plain view" exception justifying warrantless searches.[1]

By the same token, we reject the appellate court's holding that the liquor agents' presence at the fraternity house was privileged since they were investigating allegations of illegal activities in the course and scope of their official duties. While, at times, police officers may be privileged to enter or remain on the premises of another without the consent of the owner or occupier, the facts of the cause *sub judice* compel us to find a total lack of a privileged entry here. Thus, we reverse the court of appeals' conclusion with respect to privilege, and find that the trial court correctly granted the appellant's motions to suppress.

Based upon the foregoing, we hold that under *Gouled*, *supra*, and *Lewis*, *supra*, and pursuant to Section 14, Article I of the Ohio Constitution, and in the absence of any judicially recognized exception to the warrant requirement, government officers are not privileged to deceptively gain entry into the private home or office of another without a warrant, where such home or office is not a commercial center of criminal activity, and where the invitation to enter the private home or office was not extended by the occupant for the purpose of conducting illegal activities.

In line with the spirit of *Lewis*, our holding today should in no way be interpreted as a limitation on the ability of the

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[1] We also note that under the facts of this case, the second requirement under *Williams*, *supra*, for a valid "plain view" warrantless search was not met; namely, that the discovery of the evidence was inadvertent. Arguably, the third requirement of *Williams* was met; however, without satisfaction of the first and second requirements, the "plain view" exception is inapplicable.

police to employ artifice and stratagem in their efforts toward ferreting out criminal activity in our society. Rather, our disposition herein is designed to reaffirm those priceless constitutional freedoms which the framers of both the United States and Ohio Constitutions intended to protect.

Therefore, we reverse the judgment of the court of appeals and remand the cause for further proceedings in accordance with law.

Judgment reversed
and cause remanded.

HOLMES, CORRIGANand DOUGLAS, JJ., concur.

CELEBREZZE, C.J., LOCHER and WRIGHT, JJ., concur in judgment only.

CORRIGAN, J., of the Eighth Appellate District, sitting for C. BROWN, J.

85-2106

No. _____

Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1985

STATE OF OHIO,

Petitioner,

vs.

PI KAPPA ALPHA FRATERNITY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Ohio

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF OHIO,

Petitioner,

vs.

PI KAPPA ALPHA FRATERNITY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

ADDITION TO PETITIONER'S STATEMENT OF THE CASE

In addition to the facts supplied by Petitioner in this case, Respondents wish to point out that the parties below agreed that the Pi Kappa Alpha Fraternity House was a residence, and that the area in which the evidence was observed was a private residential area restricted to members.

JURISDICTION

Respondents disagree with Petitioner's statement that the Supreme Court of Ohio felt compelled to rule as it did by federal constitutional considerations. The

Supreme Court of Ohio's opinion makes it clear that the Ohio State Constitution mandated its decision. The review of federal and state Court decisions contained in that opinion was simply for the purpose of demonstrating that no exception to the warrant requirement contained in the state constitution mandated a different result.

REASONS FOR DENYING THE WRIT

1) The decision of the Ohio Supreme Court correctly interpreted the Ohio Constitution to require suppression of evidence gained by deceptive entry into a private residence where the invitation to enter was not extended by the occupant for the purpose of conducting illegal activities.

The officers in the instant case were not equipped with a search warrant when they gained entry to Defendant's premises. It is axiomatic in our criminal justice system that warrantless searches are, per se, unreasonable, unless they fall within one of the established exceptions. *Katz* v. *United States*, 389 U.S. 347 (1967); *State* v. *Sperry*, 72 Ohio Op. 2d 296 (1974). Thus, the officers' initial intrusion must be presumed unreasonable unless it fits one of the recognized exceptions to the warrant requirement. Clearly, none of these exceptions apply in the case at bar. Consent and plain view are the only possible exceptions under these facts. The Trial Court considered and rejected both in its decision.

The Trial Court's opinion discussed the possibility of consent as an exception to the warrant requirement in the case at bar. It concluded, after hearing the evidence, that the State of Ohio failed to sustain its burden of

proving consent. The claim of consent should always be viewed with suspicion by the Court. Courts "indulge every reasonable presumption against waiver." *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). The State bears the burden of proving that consent to search was freely and voluntarily given. *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968). As the Trial Court noted, consent gained by deception cannot be said to be freely and voluntarily given. Even where Defendant knowingly and voluntarily admits a police officer to his home for another purpose, he cannot be held to have thereby waived all Fourth Amendment protection. The Supreme Court of Ohio addressed this issue in *City of Lakewood* v. *Smith*, 1 Ohio St. 2d 128 (1965). The first headnote to that case states, "(a) person who admits a police officer to his premises in compliance with the officer's request for an interview, does not thereby waive his constitutional immunity from unreasonable searches, nor does he thereby consent to a search of the premises." If the Court found no consent in *Smith*, where the Defendants voluntarily admitted known police officers into their home, it is clear that no consent or voluntary waiver can be found in the instant case, where the Defendant was deceived by the police officers and did not voluntarily admit them.

2) Federal case law interpreting the Fourth Amendment to the United States Constitution and recognizing exceptions thereto, does not conflict with the decision of the Ohio Supreme Court.

The drug transaction cases cited by counsel for the State are inapplicable here. While these cases all agree that police officers may misrepresent their identity in order to make a purchase of narcotics in a defendant's

home, the decisions are based upon the particular circumstances involved in narcotic sales cases. The key case from this Court on entry by deception to make a narcotics buy is *Lewis* v. *United States*, 385 U.S. 322 (1966). That case sets out the differences between narcotics buy cases and the case at bar:

> "But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation to the *Gouled* case, *supra*, is sufficient to dispose of that contention. *Id.* at 211.

Lewis distinguishes narcotics purchase cases from ordinary searches of a residence. The reason for the distinction is the fact that the narcotics seller has converted his home into a commercial center and made a general invitation to the public to enter his home to conduct illegal business. The fact of the purchaser's identity is only incidental, as the *Lewis* Court noted, "(i)n the instant case, on the other hand, the petitioner invited the undercover agents into his home for the specific purpose of executing a felonious sale of narcotics. Petitioner's only concern was whether the agent was a willing purchaser who could pay the agreed price." *Id.* at 210. Even in those circumstances of very limited Fourth

Amendment protection, however, the Court notes that an agent so admitted to Defendant's home is not authorized to conduct a general search for evidence. The *Lewis* Court, in upholding the limited entry, found that, "(d)uring neither of his visits to petitioner's home did the agent see, hear, or take anything that was not contemplated and, in fact, intended by the petitioner as a necessary part of his illegal business." *Id.* That is certainly not true of the case at bar. Respondents here have made no invitation to the general public to participate in the purchase of liquor, legal or otherwise, in this establishment. In fact, it is quite clear that the fraternity house is open only to members of the fraternity and their expressly invited guests. The agents were aware of that restriction, as indicated by their choice of deception in the case at bar. Nor was any illegal activity contemplated in the invitation made to the liquor agents here. They were invited to inspect the premises, not to purchase liquor. Their purpose in gaining entrance to the premises was to conduct a general search. This is the express purpose forbidden by the Court in *Lewis*. Their intrusion resulted in the carrying away of evidence; which was not contemplated in the original invitation; another result which is expressly disproved by *Lewis*.

At least one other Municipal Court in Ohio faced with a similar situation found that liquor agents committed a trespass by being on the premises of a private club, restricted to members, without permission or warrant. *State* v. *Cooper*, 28 Ohio Op. 2d 361 (1963). In *Cooper*, liquor agents entered the premises of the Indian Lake Yacht Club passing over a bridge and through a gate containing a sign stating members only. The gate had no lock or latch and there was no guard posted to bar their presence on the premises. The agents remained on the premises for some period of time without being chal-

lenged or asked for their identity. Their observations led to the filing of a complaint for illegal liquor sales. In suppressing the evidence of those observations, the Court stated "The facts as stipulated indicate the prosecuting witnesses entered upon the named premises as trespassers and as such trespassers would not be competent to testify against the defendant." The Court went on to note that if the Defendants were permit holders under the liquor control law, they would have been presumed to have consented to such search. Since no such presumed consent existed in that case, however, the Court found that a search warrant was required to support the intrusion of the agents onto yacht club property.

Thus, the Ohio Supreme Court's decision in the instant case follows the interpretation other Ohio courts have placed on the state constitution's search and seizure provisions. Furthermore, its decision is not in conflict with this Court's interpretation of the federal constitutional guarantee. No conflict exists which would justify further consideration of this question.

CONCLUSION

The investigating agents' failure to obtain a search warrant for their initial intrusion into the Respondents' home violated the provisions of the Ohio Constitution. No recognized exception to the warrant requirement mandated admission of evidence so obtained. Under these circumstances, the decision of the Ohio Supreme Court neither conflicts with Federal case law, nor constitutes error. For all the reasons stated above, Respon-

dents respectfully suggest that this is not an appropriate case for review by this Court.

Respectfully submitted,

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CASE NO. 85—2106

In The Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF OHIO,

Petitioner,

v.

PI KAPPA ALPHA FRATERNITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTION PRESENTED

DOES THE FOURTH AMENDMENT PROHIBIT AN UNDER-COVER AGENT FROM USING DECEPTION IN ORDER TO SECURE AN INVITATION INTO THE HOME OF A CRIMINAL SUSPECT?

PARTIES

PETITIONER:

State of Ohio

RESPONDENT:

Pi Kappa Alpha Fraternity

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus, State of Ohio, pursuant to Supreme Court Rule 36.4, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered on April 23, 1986, in *State v. Pi Kappa Alpha Fraternity*, 23 Ohio St.3d 141 (1986).

JURISDICTION

The decision of the Supreme Court of Ohio was entered on April 23, 1986. Jurisdiction is conferred pursuant to 28 U.S.C. § 1257(3).

The syllabus of the Ohio Supreme Court's opinion makes references to both the Ohio Constitution and to federal case law. Accordingly, it is necessary to review the jurisdictional presumption promulgated in *Michigan v. Long,* 463 U.S. 1032 (1983). Pursuant to *Long,* this Court will assume that jurisdiction exists "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Id.* at 1042.

It is clear that this jurisdictional presumption should prevail in light of the opinion rendered in the instant case.[1] The Ohio Supreme Court's holding rested on its interpretation of *Lewis v. United States,* 385 U.S. 206 (1966). The court cited only one Ohio case and this was done after it had disposed of the critical issue raised by *Lewis.* Accordingly, under *Long,* it must be presumed that this case presents a federal constitutional question.

STATEMENT OF INTEREST

This case presents the Court with the opportunity to review the application of *Lewis v. United States,* 385 U.S. 206 (1966) in which this Court held that the Fourth Amendment does not require the suppression of evidence that is obtained by an undercover agent's warrantless entry into a defendant's home.

In its opinion, the Ohio Supreme Court held that it was a violation of the Fourth Amendment for two undercover agents

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[1]Although Ohio law provides that the syllabus of a decision is controlling, this Court has previously held that it is appropriate to analyze the full text of the opinion when the syllabus is ambiguous as to whether the case was decided on state or federal grounds. *Ohio v. Johnson,* 467 U.S. 493, n.7 (1984).

to misrepresent their identities in order to obtain an invitation into a fraternity house which was suspected of being in violation of various liquor laws. In arriving at this conclusion, the court construed *Lewis* to mean that an undercover agent can use deception to get into a home only when the home has been converted into a commercial center of criminal activity and the agent is invited in for the purpose of transacting illegal business.

The restriction that the Ohio Supreme Court has sought to impose on the use of undercover investigations will be gravely detrimental to the state's ability to enforce its vice laws. Specifically, the state's efforts to curtail illegal drug sales and use will be significantly impaired since it is often necessary for undercover agents to enter a suspect's home in order to consumate a drug sale. Because this decision has state-wide application, the amicus, as the law enforcement arm of the state, has a substantial interest in the resolution of the question presented in the instant case.[2]

SUMMARY OF ARGUMENT

The opinion of the Ohio Supreme Court is clearly flawed by a too narrow reading of *Lewis v. United States,* 385 U.S. 206 (1966). *Lewis* was not meant to preclude undercover agents from entering homes which have not been converted into commercial centers of criminal activity. Rather, *Lewis* and subsequent Fourth Amendment cases indicate that an undercover agent's deceptive entry into a home is not violative of the Fourth Amendment unless there is an invasion of a reasonably held expectation of privacy. The facts of the instant case unequivocally reveal that no such invasion occurred. Con-

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[2] While the State of Ohio is both petitioner and amicus in this case, briefs are being filed in both capacities because of the different perspective the state has in each capcaity. The petition for writ of certiorari was filed on behalf of the State of Ohio by the City Solicitor and City Prosecutor for Cincinnati, Ohio, as a part of their duty to enforce state criminal statutes. The amicus curiae brief is being filed by the Attorney General of Ohio because of the impact the Ohio Supreme Court's decision will have on criminal prosecutions throughout the state.

sequently, the result reached by the Ohio Supreme Court conflicts with the result compelled by a proper application of the *Lewis* decision.

In addition, the ruling in this case conflicts with the "misplaced confidence doctrine" which has emanated from *Hoffa v. United States,* 385 U.S. 293 (1966). Under this doctrine, a defendant cannot invoke the protection of the Fourth Amendment with regard to evidence that he voluntarily reveals to an undercover agent. This rule applies even when the undercover agent obtains the evidence while in the defendant's home as long as the agent does nothing to exceed the scope of his invitation. The application of this rule to the facts of the instant case likewise leads to the conclusion that the decision of the Ohio Supreme Court is erroneous.

The decision of the Ohio Supreme Court not only misapplies the precedent of this Court, but it also has crucial ramifications for the state's ability to enforce drug and other vice laws. For these reasons, it is imperative that this Court grant a writ of certiorari.

ARGUMENT

I. THE DECISION OF THE OHIO SUPREME COURT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *LEWIS v. UNITED STATES,* 385 U.S. 206 (1966) AND *HOFFA v. UNITED STATES,* 385 U.S. 293 (1966).

The primary authority over the issue in this case is *Lewis v. United States,* 385 U.S. 206 (1966). In *Lewis,* a federal narcotics agent misrepresented his identity to the defendant in order to effectuate a drug sale. The defendant subsequently invited the agent into his home where the sale was consumated. Following his arrest, the defendant moved to suppress the marijuana that he sold to the agent on the ground that the agent's warrantless entry into his home constituted a violation of the Fourth Amendment. Recognizing that the use

of deception is a necessary tool for the enforcement liquor and narcotics laws, this Court concluded that there was no Fourth Amendment violation. *Id.* at 210-12.

Despite the factual similarity between *Lewis* and the instant case, the Ohio Supreme Court held that it was a violation of the Fourth Amendment for the police to employ deception in order to receive an invitation into the fraternity house. *State v. Pi Kappa Alpha Fraternity,* 23 Ohio St.3d 141 (1986). In reaching this conclusion, the court construed *Lewis* to mean that deception can only be used to gain entry into a home when the home has been converted into a commercial center of criminal activity and the occupant of the residence extends the invitation for the purpose of conducting illegal business. *Id.* at 143. This overly narrow interpretation of *Lewis* led the court to an erroneous decision.

According to the Ohio Supreme Court, any home which has not been converted into a commercial center of criminal activity is protected from undercover investigations. Such a narrow interpretation of *Lewis* controverts the well-established principle that the Fourth Amendment protects people, not places. *Katz v. United States,* 389 U.S. 347, 351 (1967). A more plausible interpretation of *Lewis* is that the conversion of the home into a place of criminal activity and the subsequent invitation for the purpose of engaging in the criminal activity were factors which indicated that the government had done nothing to infringe upon the sanctity or privacy of the defendant's home. *See, Lewis,* 385 U.S. at 213 (Brennan, J., concurring). Therefore, the dispositive issue under *Lewis,* as later developed in *Katz,* is whether the government has intruded upon an area in which the defendant holds a reasonable expectation of privacy.

Applying this principle to the facts of the instant case compels a result which is contrary to the one reached by the Ohio Supreme Court. The house manager of the defendant fraternity invited two men whom he did not know into the house. He proceeded to give them a guided tour and clearly had no reservations about showing the soft drink machine

which sold cans of beer. These circumstances lead inescapably to the conclusion that the members of the fraternity did not have a reasonable expectation of privacy with respect to the area where the soft drink dispenser was located.

The proposition that the Ohio Supreme Court misconstrued *Lewis* is made further apparent when *Lewis* is read in conjunction with *Hoffa v. United States*, 385 U.S. 293 (1966). In *Hoffa*, the Court held that the Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Id.* at 302. This rule, which the circuit courts have since designated as the "misplaced confidence doctrine," has been held to sanction the use of deception in order for the government to gain entry into a personal residence. *Jones v. Berry*, 722 F.2d 443 (9th Cir. 1983), *cert. denied*, 104 Sup.Ct. 2343 (1984); *United States v. Schuster*, 684 F.2d 744 (11th Cir. 1982), *cert. denied*, 104 Sup.Ct. 1008 (1984); *United States v. Shields*, 675 F.2d 1152 (11th Cir.), *cert. denied*, 459 U.S. 858 (1982).

In *Berry*, a special agent for the Internal Revenue Service posed as a prospective business purchaser in order to acquire information about a businessman who was suspected of tax fraud. The agent managed to obtain an invitation to the defendant businessman's home where the defendant revealed records to the agent which confirmed the suspicion of the IRS that the defendant was engaging in tax fraud. Based on the agent's observations at the defendant's home, a search warrant was obtained and the records were seized.

In rejecting the defendant's argument that probable cause was established on the basis of an illegal search, the court acknowledged that an undercover agent may exceed the bounds of the misplaced confidence doctrine if he searches for evidence not voluntarily revealed. *Id.* at 447. However, in the absence of such circumstances, no expectation of privacy is afforded to a person who voluntarily reveals incriminating evidence to an undercover agent. *Id.* at 447-48. Therefore, if an undercover agent is invited into a personal residence and he does not search for anything that exceeds

the scope of his invitation, there is no violation of the Fourth Amendment.

The facts of the instant case disclose that the undercover police officers did nothing to exceed the scope of their invitation. The agents were extended an invitation for the purpose of receiving a tour of the house. It was during the course of their tour that they observed the machine which was being used for the illegal sale of beer. Having stayed within the parameters of their invitation, the agents did nothing to abridge the Fourth Amendment.

The foregoing analysis demonstrates that the Ohio Supreme Court misapplied *Lewis* by failing to address the issue of whether the state violated a reasonable expectation of privacy held by the defendant — an issue which is germane to the resolution of a Fourth Amendment challenge. When the facts of this case are viewed in light of *Lewis, Hoffa,* and the circuit court decisions which have interpreted those cases, it becomes clear that the undercover agents did not encroach upon any expectations of privacy in acquiring the evidence that they removed from the fraternity house. Thus, if the precedent of this Court had been properly applied, no Fourth Amendment violation would have been found. In order to rectify the improper interpretation of its decisions, this Court must grant certiorari.

II. THE OHIO SUPREME COURT'S DECISION WILL SERIOUSLY IMPAIR THE STATE'S ABILITY TO ENFORCE ITS VICE LAWS.

The decision of the Ohio Supreme Court essentially mandates that undercover investigations must hault at a suspect's doorstep unless the suspect's home is converted into a center of criminal activity and the invitation to enter the home is made for the purpose of engaging in the illegal activity. The potential ramifications of this decision must be viewed in light of the direct relationship that exists between the use of undercover investigations and the enforcement of

liquor, drug, and other vice laws. Because these laws are directed at consensual crimes where there are normally no witnesses, the employment of undercover agents, as recognized by this Court, is essential to their enforcement. *See, Maryland v. Macon,* 105 S.Ct. 2778, 2782 (1985); *Lewis v. United States,* 385 U.S. 206, 211 (1966); *see also,* Webster, *Sophisticated Surveillance — Intolerable Intrusion or Prudent Protection?,* 63 Wash. U.L.Q. 351, 360-61 (1985). Moreover, the nature of undercover operations often makes it necessary for an agent to carry on his investigation in a suspect's home. Thus, if undercover agents are precluded from retrieving evidence out of a suspect's home, the state's ability to enforce its vice laws will be frustrated.

In short, the Ohio Supreme Court's ruling will transcend its application to the facts of the instant case and have a pervasive impact on vice law enforcement. Therefore, in view of the practical significance of this ruling, a writ of certiorari must be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief of Amicus Curiae, State of Ohio, have been served by U.S. Mail, postage prepaid, on this _____ day of July, 1986, on the following counsel of record:

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